UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

PATRICIA DUGUIE and PATRICIA DEFORGE,	:	
Plaintiffs,	:	
v.	:	Docket No. 2:03-CV-105
CITY OF BURLINGTON,	:	
Defendant.	:	

OPINION AND ORDER

The plaintiffs, Patricia Duguie ("Duguie") and Patricia Deforge ("Deforge") bring this action against the City of Burlington ("Burlington") for alleged sexual harassment incidents that occurred at the Burlington Police Department ("BPD"). Duguie and Deforge allege four claims: 1) an action pursuant to 42 U.S.C. § 1983 ("Section 1983") asserting that their 14th Amendment right to equal protection under the United States Constitution was violated; 2) violation of the Vermont Fair Employment Practices Act ("FEPA"); 3) negligent supervision and; 4) termination of employment in violation of public policy. Burlington moves for summary judgment pursuant to Fed. R. Civ. P. 56 to dismiss all causes of action in this suit. Duguie and Deforge oppose Burlington's Motion for Summary Judgment and cross-move under Fed. R. Civ. P. 56 for partial summary judgment based on two theories under Section 1983: 1) Burlington is liable because an official policy

caused them to be subject to a denial of their constitutional right; and 2) Burlington's conduct amounted to intentional discrimination that resulted in a hostile work environment. Duguie and Deforge also allege that they are entitled to summary judgment based on constructive discharge and that they have established the elements of FEPA and negligent supervision claims. For the reasons that follow, Burlington's motion (Paper 45) is **granted**. Plaintiffs' Motion for Partial Summary Judgment (Paper 49) is **denied**.

Factual Background

The following facts are undisputed, or presented in the light most favorable to the nonmoving party. Patricia Duguie and Patricia Deforge worked as custodians for Loso's Janitorial Services, Inc. ("Loso's"). Loso's had a contract with the BPD to provide supplemental janitorial services. No employees of Loso's received any form of compensation from the City of Burlington. Rather, they received compensation from Loso's. Loso had the authority to decide cleaning locations for employees and assigned Duguie and Deforge to clean at the BPD. Duguie acknowledged in her deposition that Loso had assigned her to work at BPD and to clean the men's locker room (Paper 46, Ex. R). Certain BPD officials could direct the cleaning responsibilities of Loso's employees at BPD. Those included BPD Business Manager, Lise Veronneau ("Veronneau"),

BPD Deputy Chief Stephen Wark ("Wark"), and BPD full-time custodian, Steven LaTulippe ("LaTulippe") (Paper 50).

I. Duguie's Claims

From January 2000 until August 2002, Duguie was assigned by Loso to clean at the BPD. As part of her duties at BPD, she cleaned the men's locker room[1] during weekdays when BPD's regular custodian, LaTulippe, was absent from work due to vacation or illness. LaTulippe was BPD's full-time custodian and an employee of Burlington. Cleaning the men's locker room was not part of Duguie's regular cleaning routine.

Three "inappropriate" incidents occurred. First, in July 2000, while Duguie was cleaning the shower room in the men's locker room, a male officer entered the main area of the locker room. Duguie had left her cleaning barrel to hold open the main doorway. At the time the officer entered, she was cleaning the shower room. She did not see the officer begin to undress, nor did she report the incident to the BPD. In fact, she did not know whether the officer was undressed.

Another incident occurred in July 2000, involving two officers separately entering the men's locker room, within a

[1]The men's locker room consists of one large room that contains a locker area, with a smaller connected room that has showers, toilets, urinals, and sinks. The shower room is separated from the rest of the locker area by a wide doorway.

short time span of each other.[2] Duguie had left her cleaning barrel in the doorway of the men's locker room so that officers would know that she was cleaning. She was cleaning the shower room. Despite the presence of the cleaning barrel, the two officers entered the locker room. Duguie believed that the officers were going to change their clothes although she did not see the officers actually undress. Duguie did not know whether these officers knew that the regular cleaning staff was on vacation and that she was cleaning the locker room. She also did not report these incidents to anyone at BPD. However, Duguie remembers reporting them to Loso. From that point on, Duguie made and posted signs outside the men's locker room when she was cleaning.

Finally, in December 2000, Wark had asked Duguie to clean the men's locker room because it was dirty (Paper 50). Duguie placed her cleaning barrel in the main entrance door of the locker room and left to get a vacuum cleaner. When she returned, she saw a fully dressed officer in the locker room and she asked the officer if it was okay to vacuum. He verbally assented and she continued vacuuming. However, when Duguie entered the next row of lockers, she encountered two male officers, one who was dressed and the other who was in a

[2]Although these incidents occurred on the same day, within a short time span of each other, Duguie considers them separate incidents.

partial state of undress. The officer in a partial state of undress was pulling up his underwear. It is not clear whether the officers knew of her presence. Duguie immediately left the locker room. Duguie left Wark a note informing him that she would not clean the men's locker room again.

Duguie claims that she reported the last incident to her boss, Harry Loso ("Loso") and that she and Loso met with Veronneau. Veronneau recalls that she was not notified about any improper conduct involving dressing or undressing by officers, but simply that Duguie was uncomfortable (Paper 50, Ex. 4). In response to Duguie's complaint, Veronneau authorized the purchase of safety bars that could be used by all cleaning staff. The safety bar would be placed across an entranceway to notify persons that cleaning was occurring. The purchase of the safety bars occurred in May 2002.

Duguie presented conflicting statements as to whether there were additional incidents in the men's locker room after the purchase of the safety bar. During Duguie's initial deposition, on August 23, 2002, she stated that no additional incidents occurred in the men's locker room because she did not clean the locker room after the safety bar was purchased. At a second deposition on June 18, 2004, Duguie said that she did clean the men's locker room on two more occasions and male officers had entered the locker room when she was cleaning.

On those occasions, she was using the safety bar. One time, an officer entered the locker room and spoke to her. Another time, an officer came into the locker room. According to Duguie, nothing inappropriate happened with the officers when they came into the men's locker room (Paper 46, Ex. R).

After Duguie had met with Veronneau, Lieutenant Emmet Helrich told Duguie that no one at the BPD liked her. He later apologized for the remark and said that remark had nothing to do with any incidents in the locker room. Duguie alleges that another incident occurred on August 2002, which prompted her to quit her job. While cleaning, Duguie found an object (a roach clip) in the victim's advocate office and brought that object to officers to ask what it was. In response to her question, the officers laughed at her. This incident upset Duguie so much that she quit the BPD assignment and her job at Loso's. Loso then contacted Veronneau at BPD to notify her why Duguie had quit.

On September 9, 2002, Veronneau wrote to Loso and notified him of BPD's willingness to fully investigate any allegations of impropriety on the part of its officers. Loso informed Veronneau that Duguie did not wish to speak to any BPD personnel about the allegations. Veronneau wrote a letter to Loso on September 9, 2002 about these allegations of harassment in the workplace. She wrote that the "City is

prepared to investigate these claims once we have sufficient information. Be assured that if any claims of wrongful conduct can be substantiated, the City will take appropriate action" (Paper 50, Ex. 23). In that letter, Veronneau also reinforced Burlington's commitment to provide a harassment free work environment.

II. Deforge's Claims

Deforge was assigned by Loso to clean the BPD during the weekends. She had worked at Loso's since 1997. Her duties included cleaning the men's locker room. Deforge alleges that on one or more occasion, male officers would enter the locker room when she was cleaning the shower and would use the urinals while she was present and with knowledge of her presence. Deforge claims to have mentioned these incidents to Latulippe. LaTulippe only recalls one incident and remembered telling Deforge to speak to a supervisor.

After the purchase of the safety bar, Deforge claims that another incident occurred. According to Deforge, a male officer came into the men's locker room while she was in the shower area cleaning and began changing. She could see that he was wearing boxer shorts. Deforge informed him a cleaning lady was present in the locker room. The officer continued to change. In response, Deforge left the men's locker room and called Duguie, who had already quit her job at Loso's.

Deforge also told several people about the incident, including Loso and BPD employees Lieutenant Paul Glynn, Lieutenant Emmet Helrich, Victim Advocate Mary McAllister, Officer Bonnie Beck, and Latulippe.

Lieutenant Helrich informed Deforge that the officer in the incident had just worked a double shift of seventeen hours and was very tired. McAllister recalls recommending that Deforge speak to a lieutenant, who would be in charge of uniform officers on a shift, about the incident. According to Officer Beck, Deforge told her that she felt that people did not know she was present. Officer Beck also recommended that Deforge speak to a lieutenant in charge of the shift. After Deforge complained to Lieutenant Glynn, he directed all the officers at roll call to be attentive when female cleaning staff were cleaning the men's locker room. LaTulippe told Deforge to report the conduct to Veronneau. Deforge never reported the conduct to Veronneau.

On one other occasion, an officer entered the locker room while Deforge was cleaning the shower room. The officer apparently disregarded the safety bar she had placed at the door of the men's locker room. When Deforge saw him go into the shower room, she left the locker room and as she was leaving, she saw that he had removed his shirt. Again, Deforge told Duguie about this incident.

Deforge quit her job at Loso's due to these incidents, although there was not one incident which was the catalyst for her departure.

According to LaTulippe and a male janitor employed by Loso's, male police officers entered the men's locker room while they cleaned.

The City of Burlington has a non-discrimination policy, including a policy against sexual harassment. This written policy includes a complaint procedure for use by employees or other parties and is posted throughout the BPD. Under BPD directives, Lieutenants are supervisory personnel who are authorized to hear and resolve operational issues that occur during their assigned shifts.

Discussion

I. Legal Standards

Summary judgment may be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56©). The party moving for summary judgment may satisfy its burden by demonstrating "that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); Fed. R. Civ. P. 56(e). A plaintiff must proffer "concrete evidence from which a reasonable jury could return a verdict in its favor." Anderson v. Liberty

Lobby, Inc., 477 U.S. 242, 256 (1986). A court must view the facts and the inferences to be drawn from those facts "'in the light most favorable to the party opposing the motion.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 577 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting First Nat. Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 289 (1968)). "Where cross-motions for summary judgment are filed, a court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." Boy Scouts of Am. v. Wyman, 335 F.3d 80, 88 (2d Cir. 2003) (quoting Hotel Employees & Rest. Employees Union, Local 100 v. City of N.Y. Dep't of Parks & Recreation, 311 F.3d 534, 543 (2d Cir.2002) (internal quotation marks omitted)).

The standards and burdens of proof that apply to Vermont Fair Employment Practices Act ("FEPA") claim are the same as those that apply to a claim under Title VII of the Civil Rights Act of 1964 ("Title VII"). Beckmann v. Edson Hill Manor, Inc., 171 Vt. 607, 608, 764 A.2d 1220, 1222 (2000).

II. Section 1983 Claims

Duguie and Deforge contend that Burlington is liable under Section 1983 because it violated their equal protection rights. Sex-based discrimination, including sexual harassment, may be actionable under Section 1983 as a violation of equal protection. Annis v. County of Westchester, 36 F.3d 251, 254 (2d Cir. 1994). Section 1983 provides a remedy against any person who, under color of state law, deprives another of rights protected by the Constitution.

> [E]very person who, under color of any statute, ordinance, regulation, custom or usage, of any state . . . subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1996).

In order to state a claim under Section 1983, a plaintiff must allege "1) that the challenged conduct was attributable at least in part to a person acting under color of state law, and 2) that such conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States." Eagleston v. Guido, 41 F.3d 865, 876 (2d Cir. 1994) (citation omitted). The Section 1983 analysis relevant in this case involves whether Burlington had a policy or custom that violated the constitutional rights of Duguie and Deforge.

A. Official Policy or Custom

"[I]n order to establish the liability of a municipality in an action under § 1983 for unconstitutional acts by a municipal employee below the policymaking level, a plaintiff must show that the violation of his constitutional rights resulted from a municipal custom or policy." Kern v. City of Rochester, 93 F.3d 38, 44 (2d Cir. 1996) (quoting Gottlieb v. County of Orange, 84 F.3d 511, 518 (2d Cir. 1996)). A municipality may not be held liable under 42 U.S.C. § 1983 for actions alleged to be unconstitutional by its employees below the policymaking level solely on the basis of respondeat superior. Monell v. Dep't of Social Servs., 436 U.S. 658, 691 (1978). In the Second Circuit, the Zahra test is used to establish municipal liability under 42 U.S.C. § 1983. "A plaintiff is required to plead and prove three elements: 1) an official policy or custom that 2) causes the plaintiff to be subjected to 3) a denial of a constitutional right." Zahra v. Town of Southold, 48 F.3d 674, 685 (2d Cir. 1995).

Circumstantial proof, like evidence that the municipality failed to train its employees, can support a finding that such a policy exists. Id. The policy or custom does not need to be addressed in a specific rule or regulation. Sorlucco v. N.Y. City Police Dep't., 971 F.2d 864, 870 (2d Cir. 1992). A municipal policy may be inferred from the informal acts or

omissions of supervisory municipal officials. Turpin v. Mailet, 619 F.2d 196, 200 (2d Cir. 1980). "[M]unicipal inaction such as the persistent failure to discipline subordinates who violate civil rights could give rise to an inference of an unlawful municipal policy of ratification of unconstitutional conduct within the meaning of Monell." Batista v. Rodriguez, 702 F.2d 393, 397 (2d Cir. 1983) (citing Turpin, 619 F.2d at 201-02).

The parties have interpreted the official policy or custom at BPD that caused them to suffer a denial of their constitutional rights differently. Accordingly, the Court will address each of these claims.

1. Hostile Work Environment by a Policy or Custom of Failing to Supervise Employees

In the Amended Complaint, Duguie and Deforge claim that Burlington's actions and omissions had the effect of creating "an intimidating, hostile and offensive work environment" (Paper 38). This hostile work environment claim has been interpreted in Burlington's Motion for Summary Judgment to be part of the official policy or custom that allegedly caused a deprivation of the constitutional rights of Duguie and Deforge. Burlington understands the Section 1983 hostile work environment claim to be that the City had a custom or policy of failing to supervise its employees regarding the incidents

of alleged sexual harassment in the men's locker room. "[S]urviving summary judgment on a hostile environment claim under Section 1983 (as under Title VII) requires evidence not only that the victim subjectively perceived the environment to be hostile or abusive, but also that the environment was objectively hostile and abusive." Hayut v. State Univ. of N.Y., 352 F.3d 733, 744-745 (2d Cir. 2003).

"A hostile work environment claim requires a showing 1) that the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' and 2) that a specific basis exists for imputing the objectionable conduct to the employer." Alfano v. Costello, 294 F.3d 365, 372 (2d Cir. 2002) (quoting Perry v. Ethan Allen, Inc., 115 F.3d 143, 149 (2d Cir. 1997). The plaintiff must demonstrate that the workplace was so severely permeated with discriminatory intimidation, ridicule, and insult that the terms and conditions of her employment were thereby altered. Id. at 373 (citing Leibovitz v. N.Y. City Transit Auth., 252 F.3d 179, 188-89 (2d Cir. 2001)). Isolated acts, unless extreme, generally do not meet the threshold of severity or pervasiveness. Brennan v. Metro. Opera Ass'n, Inc., 192 F.3d 310, 318 (2d Cir. 1999). The plaintiff must also demonstrate that the incident occurred because of her sex. Alfano, 294

F.3d at 374. "To decide whether the threshold has been reached, courts examine the case-specific circumstances in their totality and evaluate the severity, frequency, and degree of the abuse." Id.

Duguie and Deforge do not demonstrate that the workplace was severely permeated with discrimination. Duguie and Deforge argue that their constitutional rights were denied because they were put in an environment that was harsh for women, exposing them to "men undressing and urinating" (Paper 49). In the years that Duguie and Deforge worked for Burlington, there were relatively few incidents. These isolated acts that occurred while the women were cleaning the men's locker room were not pervasive. The women were not assigned to clean the men's locker room on a regular basis. They were only assigned to clean the men's locker room when the regular BPD custodian was unavailable and on weekends. Nor is it clear whether the officers involved in the alleged incidents were aware that the female janitors were present. Even when taken in the light most favorable to Duguie and Deforge, the "harassing" incidents in the men's locker room were not sufficiently severe to alter the conditions of their employment. Thus, as a matter of law, the conditions at BPD were not sufficiently pervasive to create a hostile working environment.

Next, the Court must examine liability based on Burlington's failure to supervise its employees. "Section 1983 liability can be imposed upon individual employers, or responsible supervisors, for failing properly to investigate and address allegations of sexual harassment when through this failure, the conduct becomes an accepted custom or practice of the employer." Gierlinger v. N.Y. State Police, 15 F.3d 32, 34 (2d Cir. 1994). "[A] mere failure by the county to supervise its employees would not be sufficient to hold it liable under § 1983." Owens v. Haas, 601 F.2d 1242, 1246 (2d Cir. 1979) (citation omitted). The municipality's failure to supervise or properly train its police force must be so severe as to constitute gross negligence or deliberate indifference to a plaintiff's rights. Zanghi v. Inc. Vill. of Old Brookville, 752 F.2d 42, 45 (2d Cir. 1985) (citing Owens, 601 F.2d at 1247).

To prove deliberate indifference, a plaintiff must show that the need for more or better supervision to protect against constitutional violations was obvious. See Canton v. Harris, 489 U.S. 378, 390 (1989). "An obvious need may be demonstrated through proof of repeated complaints of civil rights violations; deliberate indifference may be inferred if the complaints are followed by no meaningful attempt on the part of the municipality to investigate or to forestall

further incidents." Vann v. City of New York, 72 F.3d 1040, 1049 (2d Cir. 1995).

There is no evidence of acquiescence by Burlington that would rise to the level of deliberate indifference. Duguie never reported the first three alleged incidents to the BPD. The BPD cannot respond to alleged civil rights violations if no one complains to the proper officials. Moreover, no repeated complaints of civil rights violations occurred to BPD officials. When the incidents were reported to Burlington, it took action to address the Plaintiffs' concerns. After Duguie complained to Veronneau about the alleged third incident, the BPD purchased safety bars that could be used by all cleaning staff to notify officers that cleaning was occurring. After Duguie left her job with Loso's, BPD offered to conduct an investigation of her complaints. Duguie declined BPD's offer. This conduct by the BPD does not amount to supervisory indifference. After Deforge complained to various BPD employees about the male officer entering the men's locker room while she was cleaning, Lieutenant Glynn spoke to the officers at roll call about being attentive to the female cleaning staff in the men's locker room.

These actions amount to a meaningful effort by Burlington to investigate and forestall future incidents. Every BPD official aware of the complaints tried to remedy the problem.

Burlington also had a written policy prohibiting discrimination and harassment by employees and all police officers were trained in that policy. This policy was publicized throughout the BPD and it also provided information for persons wanting to report misconduct. Thus, there is no finding that Burlington failed to supervise its employees regarding these incidents of sexual harassment.

2. Policy of Sending Female Janitors into the Men's Locker Room without Adequate Protection Against Sexual Harassment

Duguie and Deforge claim that the official policy or custom at issue here involved BPD's policy of sending female cleaners into the men's locker room without adequate protections against sexual harassment. "A deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." Pembaur v. City of Cincinnati, 475 U.S. 469, 483-484 (1986). The "policy" of sending female janitorial workers was not the official policy of Burlington and the BPD. Loso, the employer of Duguie and Deforge, generally decided their work schedule responsibilities.

Taking the undisputed facts in the light most favorable to the Plaintiffs, there is no evidence that Burlington participated in this policy of sending female janitors into

the men's locker room without adequate protection against sexual harassment. First, the female workers were contractors working through Loso's. They were not employees of the BPD. They did not clean the men's locker room on a daily basis. The female workers were only sent into the men's locker room when the regular janitor was on vacation or on the weekends. Second, Burlington took pro-active steps to ensure that the female janitorial workers received adequate protection against men entering the locker room while the women were cleaning. Veronneau, the official who approved the BPD cleaning contract with Loso, also approved the purchase of the safety bar to address Duguie's concerns. The safety bar purchase was meant to serve as protection against the unwanted presence of men in the locker room while female janitors were cleaning. The actions by Burlington do not constitute an established policy or custom involving sending female janitorial workers into the men's locker room without adequate protection against sexual harassment.

3. Constructive Discharge

Duguie and Deforge allege constructive discharge under their Section 1983 claim.[3] Constructive discharge of an employee occurs when the employer intentionally creates a work

[3]Plaintiffs also allege constructive discharge under two other claims, negligent supervision and FEPA.

environment that is so intolerable that the employee is, in effect, forced to quit involuntarily. See Pa. State Police v. Suders, _ U.S. _, 124 S. Ct. 2342, 2344 (2004); Chertkova v. Conn. Gen. Life Ins. Co., 92 F.3d 81, 89 (2d Cir. 1996). A work environment is intolerable if it is "'so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.'" Chertkova, 92 F.3d at 89 (quoting Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1188 (2d Cir. 1987)). See Dunbar v. County of Saratoga, 78 F. Supp. 2d 43, 47 (N.D.N.Y. 1999). Harassment can be so intolerable as to cause a resignation may be effected through co-worker conduct, unofficial supervisory conduct or official company acts. Suders, _ U.S. _, 124 S.Ct. at 2345. "For an atmosphere of harassment or hostility to be actionable, the offending behavior must be sufficiently severe or pervasive to alter the victim's employment conditions and create an abusive working environment." Id. at 2345 (citation omitted). In order to establish constructive discharge, a plaintiff must demonstrate that the "abusive working environment became so intolerable that her [the employee's] resignation qualified as a fitting response." Id. at 2347.

First of all, BPD was not the employer of Duguie and Deforge. Moreover, there is no evidence that the work environment at BPD was so intolerable that Duguie or Deforge

were forced to quit. The alleged incidents of harassment were sporadic, not pervasive. Burlington did not intentionally create a work environment that was so intolerable that the employee was forced to quit involuntarily. Indeed, there is evidence that Burlington tried to make the work environment tolerable with the purchase of the safety bars and addressing the complaints of Duguie and Deforge.

II. FEPA

Vermont's FEPA makes it an "unlawful employment practice, . . . [f]or any employer . . . to discriminate against any individual because of sex." Vt. Stat. Ann. tit. 21, § 495 (Supp. 2003). The statute applies to claims that a workplace is discriminatorily hostile or abusive. Perry, 115 F.3d at 149. With certain exceptions, FEPA is "patterned on Title VII of the Civil Rights Act of 1964, and the standards and burdens of proof under FEPA are identical to those under Title VII." Fernot v. Crafts Inn, Inc., 895 F. Supp. 668, 677 (D. Vt. 1995) (quotation omitted).

Under FEPA, Duguie and Deforge contend that Burlington's acts or omissions caused 1) discriminatory treatment on the basis of gender; 2) constructive discharge of them on the basis of gender; 3) substantial interference with their work performance; 4) an intimidating, hostile and offensive work environment; and 5) constituted sexual harassment on the basis

of gender. The Section 1983 and FEPA claims are similar. Accordingly, for the same reasons that Duguie and Deforge cannot prevail on the Section 1983 claims, they also cannot prevail on the FEPA claims.

III. Negligent Supervision

Duguie and Deforge also bring a common law negligent supervision claim against Burlington.[4] Restatement (Second) of Agency § 213 provides that:

> A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless . . . (b) in the employment of improper persons or instrumentalities in work involving risk

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[4]Burlington argues that Plaintiffs' negligent supervision claim, based on Burlington's negligence in supervising its employees and constructive discharge, is subsumed by the FEPA claim and that no cause of action is stated. In support of their claim, Burlington cites Haverly v. Kaytec, Inc., 169 Vt. 350, 356-357, 738 A.2d 86, 91-92 (1999), where the court recognized that the tort of negligent supervision had to include as an element an underlying tort or wrongful act committed by the employee. When there is a common law and statutory claim based on the same allegation, the common law claim is subsumed by the statutory claim. Haverly, 169 Vt. at 357, A.2d at 91. Duguie and Deforge contend that the negligent supervision claim is not superseded by FEPA and that all the elements of a common law negligent supervision claim are met. **In the Amended Complaint under the negligent supervision claim, Duguie alleges that Burlington's failure to supervise resulted in extreme emotional distress.** The allegations made by Duguie and Deforge under the negligent supervision claim are the same as those alleged under FEPA. The Amended Complaint did not plead, nor did the evidence support, a claim of negligent supervision based on the underlying torts Duguie and Deforge allege. In light of the Court's finding, the Court need not address whether common law claim is subsumed with the FEPA count.

> of harm to others: ©) in the supervision of the activity; or (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.

Restatement (Second) of Agency § 213 (1958). Pursuant to Restatement (Second) of Agency § 213, "[l]iability exists only if all the requirements of an action of tort for negligence exist." See Brueckner v. Norwich Univ., 169 Vt. 118, 126, 730 A.2d 1086, 1093 (1999) (quotation omitted). A plaintiff has to prove that: "(1) the employer had a duty to forbid or prevent negligent or other tortious conduct by persons upon its premises; (2) the employer breached that duty; (3) such a breach was the proximate cause of plaintiff's injury; and (4) there was actual loss or damage as a result of the injury." Haverly v. Kaytec, Inc., 169 Vt. 350, 357, 738 A.2d 86, 91 (1999).

Duguie and Deforge contend that Burlington owed them a duty to exercise reasonable care to prevent the tortious conduct of its officers. "Generally, there is no duty to control the conduct of another in order to protect a third person from harm." Peck v. Counseling Serv. of Addison County, Inc., 146 Vt. 61, 64, 499 A.2d 422, 425 (1985) (citing Restatement (Second) of Torts § 315 (1965)). An exception to this rule arises when a defendant has the power to control another's actions. Peck, 146 Vt. at 65, 499 A.2d at 425;

Restatement (Second) of Torts § 315(a) (1965) (an exception arises where a special relationship imposes a duty to control another's actions or to protect a third person.). "Employers have traditionally been liable for their employees' acts only when the employees were acting within the scope of their employment." Poplaski v. Lamphere, 152 Vt. 251, 257, 565 A.2d 1326, 1330 (1989) (citations omitted). "The more difficult question comes with the test of whether the employer knew of the need to exercise control." Bradley v. H.A. Manosh Corp., 157 Vt. 477, 482, 601 A.2d 978, 982 (1991).

Burlington was not the employer of Duguie and Deforge, but it may have had a third-party duty to protect them from harm. Even if Burlington owed a duty to Duguie and Deforge for the actions of its employees at the police station, Burlington had limited knowledge that Duguie and Deforge were being harmed. With limited knowledge about the alleged conduct, Burlington would not have known of the necessity to exercise control. Burlington took affirmative steps to remedy the situation. Therefore, Duguie and Deforge cannot meet the elements of negligent supervision.

IV. Public Policy

Duguie and Deforge allege that Burlington terminated them in violation of public policy. The Vermont Supreme Court has recognized constructive discharge in violation of public

policy as a claim for at-will employees. Dulude v. Fletcher Allen Health Care, Inc., 174 Vt. 74, 82, 807 A.2d 390, 397 (2002). In this case, however, Duguie and Deforge were not at-will employees of Burlington. They were employees of Loso's. Moreover, for reasons stated above, they were not constructively discharged and they voluntarily left their jobs at Loso's. Thus, this claim is without merit.

Conclusion

For the reasons that follow, Burlington's motion is **granted**. Plaintiffs' motion for partial summary judgment in their favor is **denied**.

Dated at Burlington, Vermont this 19th day of January, 2005.

/s/ William K. Sessions III
William K. Sessions III
Chief Judge, U.S. District Court